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No. 09-26

In the Supreme Court of the United States

SUSAN HERTZ, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROGER B. HERTZ, DECEASED, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's claim under the Federal Tort Claims Act accrued on the date that her husband was killed in a plane crash, and not on the date that petitioner learned that negligence on the part of federal employees might have played a role in the accident.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 560 F.3d 616. The opinion of the district court (Pet. App. 8a-11a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 2009. The petition for a writ of certiorari was filed on June 29, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) waives the sovereign immunity of the United States with respect to certain claims sounding in tort. See 28 U.S.C. 1346(b),

2674. The FTCA's limited waiver of sovereign immunity is coupled with a strict statute of limitations: "A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. 2401(b).

2. Petitioner's husband was a passenger on an amateur-built experimental airplane that crashed on May 31, 2004, killing all aboard. Shortly thereafter, on June 25, 2004, petitioner learned from an investigator with the National Transportation Safety Board (NTSB) that air traffic controllers may have been at least partly responsible for the crash. Pet. App. 2a.

On June 9, 2006, more than two years after the crash, petitioner submitted an administrative claim to the Federal Aviation Administration (FAA) seeking money damages for her husband's death. The FAA denied the claim as untimely because it fell outside the FTCA's two-year statute of limitations. Pet. App. 3a.

3. Petitioner then filed this action in the United States District Court for the Eastern District of Michigan, contending that her FTCA claim accrued not on the date of the plane crash, but on the date that she learned that the negligence of air traffic controllers may have played a role in her husband's death. Pet. App. 3a, 9a.

The district court granted the United States' motion to dismiss. Pet. App. 8a-11a. The court first pointed out that petitioner's husband was killed in the plane crash on May 31, 2004, and that petitioner "knew of both her husband's death and the cause of death at that time." *Id.* at 9a. The court then explained that this Court in *United States* v. *Kubrick*, 444 U.S. 111 (1979), which involved medical malpractice, explicitly rejected the contention that a claim accrues only when a plaintiff

becomes aware that his injury was negligently inflicted. Pet. App. 10a. The district court also pointed out that "Hertz had ample opportunity, 22 months, in which to file her claim even *after* she spoke with FAA officials in June 2004." *Ibid.*

4. The Sixth Circuit affirmed. Pet. App. 1a-7a. The court of appeals began by noting that "the 'general rule' is that 'a tort claim accrues at the time of the plaintiff's injury,'" *id.* at 3a (quoting *Kubrick*, 444 U.S. at 120), and that the question in this case is therefore whether there should be an exception to the rule. In this regard, the court noted that "a claim accrues when a plaintiff possesses enough information with respect to her injury that, had she sought out independent legal and expert advice at that point, she should have been able to determine in the two-year period whether to file an administrative claim." *Id.* at 4a-5a (internal quotation marks, brackets and citation omitted). The court found no reason to believe that petitioner could not have determined within the two-year period whether to file a claim. The court reasoned that "[p]lane crashes by their nature typically involve negligence *somewhere* in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim." *Id.* at 5a. And, the court continued, "[t]he record makes plain—and [petitioner] herself concedes—not only that she should have been able to determine in the two-year period whether to file a claim, but that she in fact *made* that determination * * * less than a month after the crash." *Id.* at 6a. Under these circumstances, the court of appeals found "no reason to depart from the general rule that accrual occurs upon injury," and that it thus "lack[ed] authority to overlook" peti-

tioner's failure "to file the claim in the remaining 22 months of the period prescribed by Congress." *Ibid.*

ARGUMENT

Petitioner maintains that her FTCA claim accrued only when she learned that federal employees might have been responsible for the plane crash, and not when the accident actually occurred. In correctly rejecting that contention, the court of appeals did not create a conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. This Court recognized in *United States* v. *Kubrick*, 444 U.S. 111 (1979), that the "general rule" under the FTCA is that "a tort claim accrues at the time of the plaintiff's injury," *id.* at 120, although in the medical malpractice context of that case it concluded that the claim accrued when the plaintiff knew of the medical condition and its cause, the administration of an antibiotic. See *id.* at 120-121. In this case, petitioner learned of both the injury (her husband's death in a plane crash) and the cause of his death (the plane crash) on May 31, 2004, the date on which the accident occurred. Her FTCA claim therefore accrued, and set the statute of limitations running, on that date. Because her administrative claim was filed more than two years later, her FTCA claim is "forever barred" under 28 U.S.C. 2401(b).

Petitioner nonetheless contends that her claim was timely because it was filed within two years of learning from an NTSB official that air traffic controller negligence might have contributed to her husband's death. For purposes of FTCA accrual, however, *Kubrick* distinguished—even in the medical malpractice context—between the moment that a plaintiff learns of the inflic-

tion of injury (there, the administration of an antibiotic) and the moment that he learns of the potential breach of a duty of care (there, that the antibiotic was negligently administered). See 444 U.S. at 113, 122. An appreciation of the infliction of injury, the Court reasoned, is sufficient to put the plaintiff on notice that he should take prompt steps to ascertain whether a government employee acted negligently. *Id.* at 122-123. In so concluding, the Court explained that it "cannot hold that Congress intended that 'accrual' of a claim must await awareness by the plaintiff that his injury was negligently inflicted." *Id.* at 123.

Similarly here, when petitioner learned that her husband was killed in a plane crash, she was on notice that she should "protect h[er]self by seeking advice in the [expert] and legal community." *Kubrick*, 444 U.S. at 123. And, in fact, petitioner spoke with an NTSB investigator less than a month after the crash and garnered precisely the sort of information that could have formed the basis for a timely claim. Petitioner complains that she was unaware until speaking with the investigator that negligence on the part of federal employees might have contributed to her husband's death, but *Kubrick* specifically rejected a rule that would delay accrual "until the plaintiff knew or could reasonably be expected to know of the Government's breach of duty." *Id.* at 125. As the *Kubrick* Court explained, adoption of such a rule "would go far to eliminate the statute of limitations as a defense separate from the denial of breach of duty." *Ibid.*

The court of appeals' holding that petitioner's claim was untimely in these circumstances is consistent with the decisions of other courts of appeals. See, *e.g.*, *Kronisch* v. *United States*, 150 F.3d 112 (2d Cir. 1998) (hold-

ing that a claim alleging that a Central Intelligence Agency (CIA) official slipped lysergic acid dimethylamide (LSD) to plaintiff accrued when plaintiff first learned that the CIA had administered LSD to others around the same time); *Dyniewicz* v. *United States*, 742 F.2d 484, 486 (9th Cir. 1984) (holding that, under *Kubrick*, "the 'cause' [of an injury] is known when the immediate physical cause of the injury is discovered," and that "[d]iscovery of the cause of one's injury * * * does not mean knowing who is responsible for it"); *Garrett* v. *United States*, 640 F.2d 24 (6th Cir. 1981) (per curiam) (measuring the accrual date in a wrongful death case from the date of death).

2. Petitioner urges that the Sixth Circuit's decision conflicts with decisions of four other courts of appeals. But petitioner has identified no case presenting remotely comparable facts. This aspect of the petition is significant in light of the oft-repeated acknowledgment that "[t]he question of what knowledge should put a claimant on notice of the existence of a viable claim is not soluble by any precise formula." *Waits* v. *United States*, 611 F.2d 550, 552 (5th Cir. 1980); see *McIntyre* v. *United States*, 367 F.3d 38, 52 (1st Cir. 2004) ("This inquiry is highly fact- and case-specific, as are the pertinent questions to ask.").

Here, the Sixth Circuit reasoned that "[p]lane crashes by their nature typically involve negligence *somewhere* in the causal chain; and the mere fact of the event is thus typically enough to put the plaintiff on inquiry notice of his claim." Pet. App. 5a. Under these circumstances, the Sixth Circuit held that the accident itself and the resulting injury triggered a duty to investigate and, under *Kubrick*, started the limitations period running.

This fact-bound determination does not warrant this Court's review. None of the cases that petitioner identifies from other circuits arose out of plane crashes, or, indeed, similar incidents of any kind. Petitioner instead draws largely on three First Circuit decisions stemming from FTCA suits involving intentional murder in which the circumstances affecting the application of the inquiry notice requirement under the FTCA concerning any possible role by government employees were quite different. *McIntyre*, *supra* (Federal Bureau of Investigation (FBI) agents tipped off mobsters about informants who were murdered shortly thereafter); *Skwira* v. *United States*, 344 F.3d 64 (2003) (nurse found to have murdered patients who died in a Veterans Affairs (VA) hospital), cert. denied, 542 U.S. 903 (2004); *Attallah* v. *United States*, 955 F.2d 776 (1992) (customs officials murdered and robbed a courier traveling to Puerto Rico); see *Rakes* v. *United States*, 442 F.3d 7 (1st Cir. 2006) (FBI agent tipped off mobsters and aided extortion). Those cases have little if any bearing on determining the accrual date of a claim arising out of a plane crash.

Petitioner also discusses *Garza* v. *United States Bureau of Prisons*, 284 F.3d 930 (8th Cir. 2002). The plaintiff in *Garza* was the estate of a woman who had been murdered by her husband when he was supposed to be in a halfway house. More than two years after the murder, the estate filed a claim against the government under the FTCA. The Eighth Circuit held that the claim was untimely, rejecting the argument that the statute of limitations began running only when the plaintiff learned that the person who may have contributed to the death was a federal employee. The court explained that "the statute of limitations under the FTCA 'does not

wait until a plaintiff is aware that an alleged tort-feasor is a federal employee.'" *Id.* at 935 (quoting *Gould* v. *United States Dep't of Health & Human Servs.*, 905 F.2d 738, 745 (4th Cir. 1990), cert. denied, 498 U.S. 1025 (1991)). Far from creating a circuit split, *Garza* supports the Sixth Circuit's similar determination here that accrual of petitioner's claim "[did] not wait until [she was] aware that an alleged tort-feasor is a federal employee." *Ibid.* (quoting *Gould*, 905 F.2d at 745).

Petitioner similarly invokes a Fifth Circuit case arising out of an FTCA claim alleging malicious prosecution. See *Ramming* v. *United States*, 281 F.3d 158 (2001) (per curiam), cert. denied, 536 U.S. 960 (2002). Even assuming the accrual of a malicious prosecution claim might have a bearing on this case, the Fifth Circuit in *Ramming* adhered to the general rule that an FTCA claim accrues when the tort occurred. Consistent with the Sixth Circuit here, the court held that plaintiffs had sufficient information to start the limitations period the moment they were acquitted and a tort suit became available. In so concluding, the Fifth Circuit reiterated that the "requirement of diligent inquiry imposes an affirmative duty on the potential plaintiff to proceed with a reasonable investigation in response to an adverse event." *Id.* at 163 (citation omitted).

Finally, petitioner cites *Drazan* v. *United States*, 762 F.2d 56, 59 (7th Cir. 1985), a medical malpractice case in which plaintiff's husband died of cancer. Because the plaintiff had no reason to suspect negligent medical treatment at the time of her husband's death, the Seventh Circuit held that plaintiff's claim accrued only when she learned that negligent medical attention from a government-run hospital may have contributed to her husband's death. Here, in contrast, the Sixth Circuit

concluded that plaintiff was aware that negligence may have contributed to her husband's death on the day the plane crash occurred. Pet. App. 5a. *Drazan* therefore does not conflict with the decision below; it accords with it.

Petitioner places great weight on a statement from *Drazan*, later repeated in *Garza*, 284 F.3d at 934, and *Diaz* v. *United States*, 165 F.3d 1337, 1340 (11th Cir. 1999), that "[w]hen there are two causes of an injury, and only one is the government, the knowledge that is required to set the statute of limitations running is knowledge of the government cause, not just of the other cause." *Drazan*, 762 F.2d at 59. As the context of this statement makes clear, however, the "two causes" that the Seventh Circuit had in mind were (1) the condition leading to death (cancer) and (2) that human action (the failure to take action following an x-ray) may have caused the death. The court found that knowledge as to that cause, and not merely knowledge of the cancer, triggered accrual of the FTCA claim.

In so holding, the Seventh Circuit in *Drazan* used as a shorthand the phrase "government cause"—after all, the only doctors that the plaintiff's husband there had seen were government doctors, and the cause—the failure to take action in light of the x-ray—could only have been a "government cause." But it would have been equally accurate for the Seventh Circuit to say "human cause" or "non-natural" cause. The same was true in both *Garza* and *Diaz*, where the only potential negligence arose from the conduct of prison officials. See *Jones* v. *United States*, 294 Fed. Appx. 476, 480 (11th Cir. 2008) (noting that "[t]he *Drazan* and *Diaz* cases refer to knowledge of a 'government cause' simply because the government was the defendant in those

cases"). None of the cases cited by petitioner addresses the circumstances presented here, where petitioner was immediately on notice of her husband's death in a plane crash and that negligence may have contributed to the plane crash, but was not necessarily aware of the exact source of any such negligence.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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